

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SYNETHIA WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
September 9, 1997

No. 187416
Oakland Circuit Court
LC No. 93-126289-FH

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Defendant, a nurse's assistant working in a senior citizen's home, was found to have intentionally set fire to the clothing of an elderly blind man under her care who had Alzheimer's disease, apparently because she was upset over her paycheck. Defendant was convicted by a jury of burning a dwelling house, MCL 750.72; MSA 28.279, and assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.267. The court sentenced her to five to twenty years' imprisonment, and five to ten years' imprisonment, respectively. She now appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support her convictions. In reviewing the sufficiency of the evidence, this Court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the crime were established beyond a reasonable doubt. *People v McCrady*, 213 Mich App 474, 484; 540 NW2d 718 (1995). A trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Intent may be inferred from all the facts and circumstances of the case. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). This Court may not interfere with the jury's role of determining the weight and credibility of the evidence. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

MCL 750.72; MSA 28.267 provides:

Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

In the present case, the jury heard the testimony of several different witnesses that defendant was assigned to the victim's room, and she was standing in the doorway of his room when he yelled out that he was on fire. There was no evidence that anyone else was in the vicinity of the room at the time of the fire. The prosecution's expert testified that the fire was started intentionally by an open flame. Ella Barnes testified that, before the fire, she saw defendant near the nurse's station where she had left her lighter, and after the fire, her lighter was missing. There was also evidence that defendant was angry with her employers over a discrepancy in her paycheck. Further, Stacey Boyce testified that defendant had said she was standing at the nurse's station when the victim cried out that he was on fire, which contradicted the other witnesses' testimony that defendant was standing in the doorway of the victim's room. Finally, there was evidence suggesting that defendant had an unusually "nonchalant attitude" as she was standing outside the victim's room as he cried out for help. Viewed in a light most favorable to the prosecution, we find that the evidence was sufficient to allow a reasonable trier of fact to determine that the elements of arson were proven beyond a reasonable doubt.

Defendant also argues that the evidence was not sufficient to convict her of assault with intent to commit great bodily harm. The elements of the offense are: (1) an attempt or offer with force or violence to do corporal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). The crime of assault with intent to do great bodily harm less than murder requires proof of specific intent. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). The specific intent necessary to constitute the offense may be found in conduct as well as words. *Id.*; *People v Jackson*, 25 Mich App 596, 598; 181 NW2d 794 (1970). Although the basis of defendant's argument is not clear from her brief, she appears to be arguing that there was no evidence of specific intent. The jury heard evidence that, taken in a light most favorable to the prosecution, supported a finding that defendant intentionally set fire to the victim's clothing knowing that he was blind and incapacitated. Therefore, we find that the evidence was sufficient from which a reasonable trier of fact could have inferred that defendant intended to cause the victim great bodily harm.

Defendant also argues that the trial court erred when it reserved its decision on her motion for directed verdict until after closing arguments. We agree that the court erred by failing to comply with MCR 6.419(A). However, we find that this error was harmless because the prosecution had presented sufficient evidence to convict defendant at the close of its proofs, and the record indicates that defendant voluntarily exercised her right to remain silent after being informed by counsel that she had a right to testify or to present witnesses. See *People v Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1995).

Defendant next argues that her convictions were against the great weight of the evidence because there was no direct evidence against her, and the evidence presented indicated that there were several individuals who could have started the fire. We disagree.

This Court reviews a denial of a motion for a new trial based on a great weight of the evidence argument under an abuse of discretion standard. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). The question is whether the verdict was manifestly against the clear weight of the evidence. *Id.* A verdict may be vacated only when it does not find reasonable support in the evidence, but is more likely attributed to causes outside the record, such as passion, prejudice, sympathy, or some extraneous influence. *Id.* A new trial may be granted when the verdict has resulted in a miscarriage of justice. *Id.*

Although there was no direct evidence against defendant, the jury heard circumstantial evidence from which it could infer that defendant intentionally set fire to the victim's clothing or bed linens using Ella Barnes' cigarette lighter. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *Wolford, supra* at 480. Although defendant speculates that "others could have just as easily come and gone from the adjoining rooms," there was no evidence presented that indicated that anyone other than defendant was in or near Perkins' room at the time of the fire. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that she is entitled to a new trial because the jury was tainted by overhearing conversations in the judge's chambers regarding a withdrawn guilty plea by defendant. We disagree. Once a jury has been polled and discharged, the verdict may not be challenged by oral testimony or affidavits by its members or outside parties regarding mistakes or misconduct inherent in the verdict. *People v Riemersma*, 104 Mich App 773, 785; 306 NW2d 340 (1981). However, affidavits or testimony impeaching the verdict may be received where they concern overt acts accessible to the jurors that do not involve matters inherent in the verdict. *People v Vettesse*, 195 Mich App 235, 244; 489 NW2d 514 (1992).

After an evidentiary hearing on the issue, the trial court denied defendant's request to investigate the matter further, stating that the evidence did not indicate the content of any possible conversations that the jury may have heard and both attorneys testified that they did not recall ever discussing defendant's prior plea at any time after jury selection. After reviewing the record, we find that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also argues that she is entitled to a new trial based on the cumulative nature of these errors. However, because the errors were not prejudicial, the cumulative nature of the errors did not deny defendant a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Defendant next argues that she is entitled to resentencing because the sentencing guidelines were improperly scored. We disagree. The Michigan Supreme Court has recently held that, because the sentencing guidelines do not have the force of law, an error in the scoring of the guidelines is not a legal error. *People v Mitchell*, ___ Mich ___ (Docket Nos. 98984, 98985, rel'd March 25, 1997), slip op

at 31. Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. *Id.* at 34. Application of the guidelines states a cognizable claim only where: (1) a factual predicate is wholly unsupported; (2) a factual predicate is materially false; or (3) the sentence is disproportionate. *Id.* at 33.

Specifically, defendant challenges the court's assessment of ten points for Offense Variable 19. A score of ten points is appropriate when a defendant possessed an incendiary device or explosives. The sentencing guidelines provides that "incendiary device" refers to "the use of gasoline or other flammable substances, blow torches, fire bombs, Molotov cocktails, etc." At the sentencing hearing, the prosecutor argued that the guidelines were correctly scored because a butane lighter could be considered an incendiary device. The trial court agreed that the guidelines were correctly scored. On appeal, defendant argues that there was no evidence that a butane lighter was used. We disagree. Evidence was presented at trial that Ella Barnes' cigarette lighter was missing from her drawer after the fire, and defendant had access to that drawer. Although there was not definitive evidence that the fire was started by a butane lighter rather than by matches, we cannot say that the court's finding that defendant used an incendiary device was wholly unsupported or materially false. Therefore, defendant's argument has no merit.

Finally, defendant argues that her sentence was disproportionate. A sentence must be proportionate to the nature of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). On review of the record, we find that defendant's minimum five-year sentence was proportionate to the severity of the offense. Defendant intentionally set fire to the clothing of an elderly blind man who had Alzheimer's disease, apparently because she was upset over her paycheck. In our judgment, defendant's sentence was eminently justified and she is not entitled to resentencing.

Affirmed.

/s/ Maura D. Corrigan

/s/ Jane E. Markey

/s/ Stephen J. Markman